No. 87-1690

Supreme Court, U.S.
FILED
MAY 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

BECHTEL POWER CORPORATION,

Petitioner,

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 57, JAMES K. HOUSE-KEEPER AND JAY E. TRINNAMAN,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOSEPH E. TESCH
Attorney for Respondents
1821 Sidewinder Drive
P. O. Box 3390
Park City, Utah 84060
Telephone: (801) 649-5700

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

Whether a cause of action in state court based entirely upon state prohibited blacklisting is preempted by Section 301 where the parties have executed a collective bargaining agreement in which some terms of hiring and discharge have been agreed upon.

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	2
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Denying the Writ	4
The Court of Appeals Opinion Consistently and Correctly Applied This Court's Decisions on Removal Jurisdiction Under the Well-Pleaded Complaint Rule.	5
1. The Tenth Circuit Opinion is Correct and is Not in Conflict with Authority From Other Circuits as Alleged in the Petition.	5
2. The Tenth Circuit's Opinion did not Reach *Metropolitan Life* and Reserved Those Issues for First Analysis by the State Court.	6
3. The Tenth Circuit's Decision does not Reach the Issue of Mandatory Grievance Procedures Since it Correctly Holds that the District Court is Without Removal Jurisdiction.	8
4. The Tenth Circuit's Decision is Not Controlled by *Lingle v. Norge Division of Magic Chef, Inc.*	8
Summary	9

TABLE OF AUTHORITIES

Page

CASES

Bechtel Power Corporation v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 57, et al., 834 F.2d 884 (10th Cir. 1987) 7

Campbell v. McLean Trucking Co., 592 F.Supp. 1560 (E.D.N.Y. 1984) 6

Caterpillar, Inc. v. Williams, 482 U.S. —, 96 L.Ed. 2d 318, 107 S.Ct. 2425 (1987) 7, 9

Gully v. First National Bank, 299 U.S. 109 (1936) 9

Hull v. Central Transport, Inc., 628 F.Supp. 784 (N.D.Ind. 1986) 6

Lingle v. Norge Division of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987), *cert. granted,* 108 S.Ct. 226 (1987) 8, 9

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) 6, 7

Peterson v. Air Line Pilots, 759 F.2d 1161 (4th Cir. 1985), *cert. denied,* 474 U.S. 946 (1985) 5, 6

STATUTES

28 U.S.C. Sections 1331 and 1441 4

29 U.S.C. Section 151 (National Labor Relations Act, Sections 7 and 8) ..... *passim*

29 U.S.C. Section 185 (Labor-Management Relations Act, Section 301) ..... *passim*

45 U.S.C. Section 151 (Railway Labor Act) 5

No. 87-1690

—o—

In The

Supreme Court of the United States

October Term, 1987

—o—

BECHTEL POWER CORPORATION,

Petitioner,

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 57, JAMES K. HOUSE-KEEPER AND JAY E. TRINNAMAN,

Respondents.

—o—

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

On April 6, 1988, Petitioners Bechtel Power Corporation and Ronald Weatherred (hereinafter "Petitioners") filed for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit (hereinafter "Petition") in favor of United As-

sociation of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 57, James K. Housekeeper and Jay E. Trinnaman (hereinafter "Respondents"). This response is in opposition to the issuance of that Writ.

———o———

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 834 F.2d 884 and is reproduced on pages A-1 through A-11 of Appendix A of the Petition. The opinion and order of the District Court is unreported and is reproduced on pages B-1 through B-2 of Appendix B of the Petition.

———o———

JURISDICTION

Respondents concede jurisdiction as invoked by the Petition.

———o———

STATUTORY PROVISIONS INVOLVED

All the necessary statutory provisions for deciding this Petition are contained in pages D-1 through D-3 of Appendix D of the Petition.

———o———

STATEMENT OF THE CASE

Petitioners, as construction managers of a large scale power plant, blacklisted workers by refusing to allow independent subcontractors at the job site to hire them for thirty (30) days after they had been discharged by any other subcontractor at that site. This blacklisting was not bargained for or authorized in any labor agreement, was unrelated to any protected union activity under Section 8 of the National Labor Relations Act (NLRA), 29 U.S.C., Section 158, and was in apparent violation of certain state of Utah constitutional and statutory provisions.

Without reference to or reliance upon any rights granted under any labor agreement or protected by Section 8 of the NLRA, Respondents filed a complaint in state court alleging only violations of state of Utah laws prohibiting such blacklisting. See Petition Appendices D and E. There are no allegations in the complaint which parallel the protected or prohibited activities under the NLRA.

Petitioners removed the Complaint to federal court, alleging preemption under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C., Section 185, then moved for dismissal on the grounds that (1) Respondents failed to exhaust controlling grievance procedures, and (2) the challenged activity was a mandatory subject of collective bargaining and, therefore, protected by Section 8 of the National Labor Relations Act.

The Respondents sought remand to state court on the theory that they relied only upon causes of action grounded in state law, unrelated to any labor agreement and unrelated to any rights protected by Section 8 of the NLRA.

The United States District Court for the State of Utah denied Respondents' motion to remand, then dismissed the complaint, apparently on the theory that Respondents had failed to exhaust mandatory grievance procedures.

The Tenth Circuit reversed, holding that since the complaint relied only upon rights arguably granted and protected by state law which were not preempted by Section 301 of the LMRA, under the well-pleaded complaint rule, the district court lacked jurisdiction under 28 U.S.C., Sections 1331 and 1441. It then held that since Petitioners' claims of preemption under Sections 7 and 8 of the NLRA were raised only as a defense to the complaint, they were to be addressed in the first instance by the Utah state courts.

Petitioners request a Writ of Certiorari seeking to reverse that decision.

REASONS FOR DENYING THE WRIT

The decision of the Tenth Circuit Court of Appeals turned on the issue of whether the district court had original jurisdiction under 28 U.S.C. Sections 1331 and 1441. In ruling that the district court did not have original jurisdiction, the Tenth Circuit decided only two issues: (1) the complaint relied completely on state law and, therefore, under the well-pleaded complaint rule, no removal jurisdiction existed; and, (2) as the issue of federal preemption under NLRA, Sections 7 and 8, is raised only as

a defense to the complaint it must, therefore, be addressed in the first instance by the state court.

———o———

ARGUMENT

THE COURT OF APPEALS OPINION CONSISTENTLY AND CORRECTLY APPLIED THIS COURT'S DECISIONS ON REMOVAL JURISDICTION UNDER THE WELL-PLEADED COMPLAINT RULE.

1. The Tenth Circuit Opinion is Correct and is Not in Conflict with Authority From Other Circuits as Alleged in the Petition.

Petitioners cite only three cases allegedly in conflict with the Tenth Circuit's decision, all of which are clearly distinguishable, one of which is clearly wrongly decided.

(a) Petitioners' reliance on *Peterson v. Air Line Pilots Ass'n.*, 759 F.2d 1161 (4th Cir. 1985), *cert. denied* 474 U.S. 946 (1985), as a conflicting authority is misplaced. Peterson, a former airline pilot, sought tort damages against his union as a result of conspiracy to achieve his wrongful discharge which was motivated by Peterson's prior work as a replacement pilot during a union sponsored strike. However, Peterson's claim arose not under Sections 7 or 8 of the NLRA, or under the LMRA, but under the Railway Labor Act, 45 U.S.C., Section 151 *et seq.*, and as the Fourth Circuit noted: " . . . Preemption under the RLA has followed a similar tack [to preemption under the NLRA], but a more stringent pattern of judicial difference has emerged. . ." *Id.* at pages 1168-1169.

Furthermore, while Peterson's claims against his union for blacklisting were based upon his actions during a labor dispute paralleling rights protected by Section 8 of the NLRA, the blacklisting complained of in this case is not based upon any actions of the Petitioners arguably protected or prohibited by Sections 7 or 8 of the NLRA.

In *Campbell v. McLean Trucking Co.*, 592 F.Supp. 1560 (E.D.N.Y. 1984), the employee, as in *Peterson*, alleged blacklisting by his employer as a direct result of Campbell's involvement in an unauthorized work stoppage. As Campbell filed suit in a federal district court, no removal jurisdiction issue was presented. Furthermore, as his state blacklisting claim alleged activity clearly protected by the NLRA (a matter not present here), his claim was preempted.

Petitioners' reliance on *Hull v. Central Transport, Inc.*, 628 F.Supp. 784 (N.D. Ind. 1986), is similarly misplaced. In *Hull*, the plaintiff brought suit in state court directly alleging and relying upon a bargaining agreement, thus providing a sound basis for removal jurisdiction. Furthermore, although the court held that Hull's blacklisting allegations under Indiana state law were preempted, it did so summarily without any discussion of the issues and incorrectly relied upon *Peterson* and *Campbell, supra*, as its authority for that holding.

2. The Tenth Circuit's Opinion did not Reach Metropolitan Life and Reserved Those Issues for First Analysis by the State Court.

Petitioners argue that the Tenth Circuit failed to analyze the impact of *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985). However, the Tenth Cir-

cuit's reason for not analyzing the *Metropolitan Life* issues was that the district court and, therefore, the Tenth Circuit, lacked jurisdiction under the well-pleaded complaint rule, and that since the complaint's blacklisting claims are not preempted by Section 301 of LMRA, the issue of preemption under Sections 7 and 8 of the NLRA, raised as defenses only, cannot provide a basis for removal jurisdiction, citing *Caterpillar, Inc. v. Williams*, 482 U.S. —, 96 L.Ed.2d 318, 107 S.Ct. 2425 (1987):

> "'. . . The presence of a federal question, even a Section 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. . . . But a *defendant* cannot, merely by ingesting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, . . .' *Id.* 107 S.Ct. at 2433 (emphasis in original) (Footnote omitted)'' *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d at 884 (10th Cir. 1987) at 889-90, Petition Appendix A-8.

Any decision by the Utah courts on the *Metropolitan Life* issues is subject, of course, to review.

However, even though the Tenth Circuit did not reach this issue, it is apparent that the Utah blacklisting statutes as they relate to the facts alleged in the complaint involve matters which are only peripherally concerned with federal labor law and which, while setting minimum standards for the treatment of discharged employees which apply to all workers whether or not a collective bargain-

ing agreement exists, do not alter the economic balance of power between labor and management as designed by Congress in the framework of the NLRA.

Furthermore, the blacklisting complained of in the complaint, as it is unrelated to any labor union activity, does not form a basis of an unfair labor practice as arguably protected or prohibited by Sections 7 and 8 of the NLRA. The complaint relies entirely on State of Utah policy as incorporated in its Constitution since 1896, that once a worker is discharged he is to be free from interference when seeking new employment. Indeed, with rare exceptions, blacklisting on facts such as these has become so archaic as to be of virtually no concern to national labor policy.

3. The Tenth Circuit's Decision does not Reach the Issue of Mandatory Grievance Procedures Since it Correctly Holds that the District Court is Without Removal Jurisdiction.

The Petition states that the Tenth Circuit's decision "ignores" the grievance procedure issue. However, as noted in the previous section, its failure to address that issue is based upon its decision that no removal jurisdiction exists, and that since that issue of mandatory grievance procedure is raised only as a defense, it does not overcome the well-pleaded complaint rule.

4. The Tenth Circuit's Decision is Not Controlled by Lingle v. Norge Division of Magic Chef, Inc.

Petitioner's last basis for requesting certiorari is that this case raises issues "similar" to those raised in *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 226 (1987), now before

this court as No. 87-259. *Lingle* is concerned only with the issue of retaliatory discharge and mandatory grievance procedures under bargaining agreements which have "just cause" discharge provisions; and, while *Lingle* may refine the issue of Section 301 preemption, as may all cases involving a balancing of state regulations against the federal labor policy, it is unlikely that it will affect the validity of the Tenth Circuit's opinion in this blacklisting case since its decision is consistent with the well-pleaded complaint rule. *Caterpillar v. Williams,* 482 U.S. —, 96 L.Ed. 2d 318, 107 S.Ct. 2425 (1987), *Gully v. First National Bank,* 299 U.S. 109 (1936).

———o———

SUMMARY

The Tenth Circuit's decision correctly applied the well-pleaded complaint rule in determining that, on its face, the complaint relies entirely on state remedies, and, therefore, no removal jurisdiction exists; and, that any preemption issue under the NLRA is raised only as a defense to the complaint and must be addressed in the first instance by the state courts.

Respectfully submitted,

JOSEPH E. TESCH
Attorney for Respondents
1821 Sidewinder Drive
P. O. Box 3390
Park City, Utah 84060
Telephone: (801) 649-5700

Dated: May 6, 1988